

## Exhibit E

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

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IN RE: CA-04-10294-DPW

SONUS NETWORKS, INC. CA-04-10359-DPW

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BEFORE THE HONORABLE DOUGLAS P. WOODLOCK

UNITED STATES DISTRICT COURT JUDGE

HEARING

JUNE 28, 2004

APPEARANCES:

JUDEN JUSTICE REED, ESQ., Schubert & Reed, LLP,  
Two Embarcadero Center, Suite 1660, San Francisco,  
California 94111, on behalf of Michelle Burk,  
plaintiff in derivative case

JOHN C. MARTLAND, ESQ., Gilman and Pastor, LLP,  
Stonehill Corporate Center, 999 Broadway, Suite  
500, Saugus, Massachusetts 01906, on behalf of  
Michelle Burk, plaintiff in derivative case

TRAVIS E. DOWNS, III, ESQ., Lerach, Coughlin,  
Stoia & Robbins, LLP, 401 B. Street, Suite 1700,  
San Diego, California 92101, on behalf of  
Global Undervalued Securities Master Fund

MICHAEL K. MATTCHEN, ESQ., Dangel & Mattchen, LLP,  
10 Derne Street, Boston, Massachusetts 02114, on  
behalf of Michael Pisnoy, plaintiff in derivative  
action

PAUL T. WARNER, ESQ., Reich & Binstock, 4265  
San Felipe, Suite 1000, Houston, Texas 77027,  
on behalf of Michael Pisnoy, plaintiff in  
derivative action

## 1 APPEARANCES (Continued):

2 ALAN L. KOVACS, ESQ., 2001 Beacon Street, Suite  
3 106, Boston, Massachusetts 02135, on behalf of  
Daniel Williams, plaintiff in derivative action

4 WILLIAM B. FEDERMAN, ESQ., Federman & Sherwood,  
5 120 N. Robinson, Suite 2720, Oklahoma City,  
Oklahoma 73102, on behalf of Daniel Williams,  
6 plaintiff in derivative action

7 JUSTIN S. KUDLER, ESQ., Schatz & Nobel, P.C.,  
330 Main Street, Hartford, Connecticut 06106-1851,  
8 on behalf of Brad Rollow, plaintiff

9 GLEN DeVALERIO, ESQ. and NICOLE R. STARR,  
Berman, DeValerio, Pease, Tabacco, Burt &  
10 Pucillo, One Liberty Square, 8th Floor,  
Boston, Massachusetts 02109, on behalf of  
James Brower, plaintiff in securities action

11 SOLOMON B. CERA, ESQ., Gold, Bennett, Cera &  
12 Sidener, LLP, 595 Market Street, Suite 2300,  
San Francisco, California 94105-2835, on  
13 behalf of Plaintiff Movant and BPI Global  
Asset Management

14 DARREN J. CHECK, ESQ., Schifffrin & Barroway,  
15 LLP, Three Bala Plaza East, Suite 400,  
Bala Cynwyd, Pennsylvania 19004, on behalf  
16 of the Farhat Group, plaintiff in the securities  
action

17 TODD HEYMAN, ESQ., Shapiro, Haber & Urmy, LLP,  
18 53 State Street, Boston, Massachusetts 02108,  
on behalf of the Farhat Group, plaintiff in  
19 the securities action

20 JEFFREY B. RUDMAN, ESQ. AND DANIEL W. HALSTON,  
ESQ., Wilmer Cutler Pickering Hale and Dorr, LLP,  
21 60 State Street, Boston, Massachusetts 02109, on  
behalf of Sonus Networks, Inc.

22 ROBERT S. FRANK, JR., P.C., Choate, Hall & Stewart,  
23 53 State Street, Boston, Massachusetts 02109, on  
behalf of Hassan Ahmed, Defendant

24 (Appearances continued next page)  
25

1 APPEARANCES (Continued):

2 MATTHEW J. MATULE, ESQ., Skadden, Arps, Slate,  
3 Meagher & Flom, LLP, One Beacon Street, Boston,  
4 Massachusetts 02109-3194, on behalf of Stephen J.  
5 Nill, Defendant

6 JOHN D. HUGHES, ESQ., Edwards & Angell, LLP,  
7 101 Federal Street, Boston, Massachusetts 02110,  
8 on behalf of Defendants Ruben Gruber, Paul R.  
9 Jones, Edward N. Harris and J. Michael O'Hara

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Courtroom No. 1 - 3rd Floor  
1 Courthouse Way  
Boston, Massachusetts 02210  
2:30 P.M. - 3:15 P.M.

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Pamela R. Owens - Official Court Reporter  
John Joseph Moakley District Courthouse  
1 Courthouse Way - Suite 3200  
Boston, Massachusetts 02210

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Method of Reporting: Computer-Aided Transcription

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1           THE CLERK: This Honorable Court is now in  
2 session. Please be seated.

3           Calling the case in Re: Sonus Network  
4 Litigation. Could I have counsel please identify  
5 yourself for the record?

6           MR. REED: Justice Reed, Schubert & Reed,  
7 San Francisco, California, for Plaintiff Michelle Burk  
8 in the derivative case.

9           MR. MARTLAND: John Martland, Your Honor,  
10 Gilman and Pastor, Saugus, Massachusetts, for  
11 Plaintiff Michelle Burk, derivative action.

12           MR. DOWNS: Good afternoon, Travis Downs,  
13 Lerach, Coughlin, San Diego, California, for the Global  
14 Undervalued Fund in the securities action.

15           MR. MATTCHEN: Good afternoon, Your Honor,  
16 Michael Mattchen from Dangel & Mattchen for the  
17 Plaintiff Michael Pisnoy in the derivative action.

18           MR. WARNER: Good afternoon, Paul Warner,  
19 Houston, Texas firm of Reich & Binstock, also on behalf  
20 of the derivative plaintiff Michael Pisnoy.

21           MR. KOVACS: Alan Kovacs, Boston,  
22 Massachusetts, on behalf of Plaintiff Williams in the  
23 derivative action.

24           MR. FEDERMAN: Bill Federman, Federman &  
25 Sherwood, on behalf of Plaintiff, Daniel Williams,

1 in the derivative action.

2 MR. KUDLER: Your Honor, I'm Justin Kudler  
3 from Schatz & Nobel and represent the Plaintiff Brad  
4 Rollow.

5 MR. DEVALERIO: Your Honor, Glen DeValerio and  
6 Nicole Starr for the Plaintiff Brower in the securities  
7 action.

8 MR. CERA: Good afternoon. I'm Solomon Cera  
9 of Gold, Bennett, Cera & Sidener, representing BPI  
10 Global Asset Management.

11 MR. CHECK: Good afternoon, Your Honor.  
12 Darren Check from Schifffrin & Barroway in Bala Cynwyd,  
13 Pennsylvania, on behalf of the Farhat Group in the  
14 securities action.

15 MR. HEYMAN: Good afternoon, Todd Heyman  
16 from Shapiro, Haber & Urmy in Boston, Massachusetts,  
17 local counsel for the Farhat Group.

18 MR. RUDMAN: Jeff Rudman from Wilmer Cutler  
19 Pickering Hale & Dorr for the Sonus employees and  
20 directors.

21 MR. HALSTON: I'm Dan Halston from the same  
22 firm and for the same defendants.

23 MR. FRANK: Robert Frank from Choate, Hall &  
24 Stewart for the Defendant Hasan Ahmed.

25 MR. MATULE: Matthew Matule, Skadden, Arps,

1 Slate, Meagher & Flom here in Boston on behalf of  
2 Defendant Stephen J. Nill.

3 MR. HUGHES: Good afternoon, Your Honor,  
4 John Hughes from Edwards & Angell for the individual  
5 defendants, Gruber, Jones, Harris and O'Hara.

6 THE COURT: Let me start with the derivative  
7 case. What's the status of the motion to dismiss before  
8 Judge Van Gestel?

9 MR. HALSTON: The hearing was heard on that  
10 June 11th, Your Honor, and that matter has been taken  
11 under advisement.

12 THE COURT: What exactly does he have -- two  
13 cases, three cases? What does he have?

14 MR. HALSTON: Two cases, one brought on behalf  
15 of Plaintiff Palma and the other one brought on behalf  
16 of Plaintiff Tillman.

17 THE COURT: Is there anything distinctive  
18 about those cases as opposed to the derivative cases  
19 here?

20 MR. HALSTON: I think the only thing  
21 distinctive is that I think you may have one more  
22 defendant in those cases and you may have one or more  
23 additional claims that are brought in those particular  
24 cases. But otherwise, they are the same. There was  
25 also a request for discovery and there was a motion to

1 stay discovery in that case. That has also been  
2 allowed. Discovery has been stayed until the court  
3 rules on the motion to dismiss. But I think otherwise  
4 the claims are very similar to the derivative claim  
5 that's been brought here.

6 MR. REED: Justice Reed for Plaintiff Michelle  
7 Burk. I think it's a little early to draw distinctions  
8 because one of the things we would hope to do today  
9 would be to have the three derivative cases before Your  
10 Honor consolidated and to schedule the filing of a  
11 consolidated amended complaint which might include  
12 additional parties or additional theories of recovery.

13 THE COURT: Well, I'm just thinking ahead of  
14 why there shouldn't be coordination with Judge Van  
15 Gestel's case informally.

16 MR. REED: Certainly we would work with  
17 defendants to coordinate discovery going forward,  
18 pretrial proceedings.

19 MR. FEDERMAN: Your Honor, if I might, Bill  
20 Federman. One of the things the derivative counsel  
21 would seek to do here -- I don't know about my  
22 co-counsel. But to end the amended complaint where  
23 we consolidate the derivative cases, then file for  
24 a surveying obsolete possible violation which  
25 is going to be in the federal court. They can't pursue



1       that claim in the state court. But we would reach out  
2       to the state court action if it's surviving the motion  
3       to dismiss and coordinate with counsel there.

4               THE COURT: Well, I guess, my view is that  
5       particularly in the same state, that it's relatively  
6       easy to do coordination without formally getting in  
7       trouble about different jurisdictions.

8               Now, what's the need for appointment of lead  
9       counsel in this as to the derivative cases?

10              MR. REED: I think it's a matter of judicial  
11       efficiency, Your Honor. You have three competing cases,  
12       one of which is currently stayed. But I think that  
13       that's -- you know, we all view that as temporary. And  
14       for the same reason that you appoint a single lead  
15       counsel to run 20 consolidated class cases, it's just  
16       that you need someone for the defendants to go to. And  
17       I'm happy to work with any or all of the derivative  
18       counsel. And for that matter, we have a good working  
19       relationship with the Robbins, Mutter & Fink firm that  
20       is plaintiffs' counsel in the state derivative cases.

21              THE COURT: Well, let me hear you on the  
22       question of your appointment.

23              MR. REED: Excuse me?

24              THE COURT: Let me hear you on the question of  
25       your appointment.

1 MR. REED: My firm seeks appointment as --

2 THE COURT: Just talk in terms of pure

3 numbers. How much do you have?

4 MR. REED: I'm sorry. How much what?

5 THE COURT: How much do you have in this case?

6 How do we evaluate this financially as a derivative case

7 for you?

8 MR. REED: in terms of damages?

9 THE COURT: Yes.

10 MR. REED: Damages in the derivative case are

11 measured by the loss of value to the corporation in

12 terms of its ability to track future financing of

13 insider trading. The damages, there's two million

14 dollars of damages alleged there. The market loss is

15 significant. Roughly a quarter of the company's market

16 price has gone away. And that's a surrogate for the

17 damage of the loss of the value of the company. It's

18 not a direct measure, but it's a good indicator.

19 THE COURT: Well, I guess what I'm asking is

20 -- it seems like a simple question, a simple-minded

21 question -- to evaluate in a way that I will with

22 respect to the securities cases the financial interest,

23 financial investment and the ability of your plaintiff

24 or plaintiffs to function effectively as lead counsel.

25 MR. REED: My understanding is that each of

1 the derivative plaintiffs own a relatively nominal  
2 amount of stock; that probably the more, I guess, common  
3 inquiry is into the bona fides of counsel. And I have  
4 as co-counsel the Alderstein (ph.) firm of New York, and  
5 the Gilman and Pastor firm here in Boston. Together  
6 with the firm, we just recently successfully litigated  
7 to a settlement the Quest Communications International  
8 case in Denver. That was a 25 million dollar recovery  
9 for the company together with -- we negotiated the  
10 corporate governance --

11 THE COURT: What do you think I'm doing? I'm  
12 somewhat perplexed. What do you think I'm doing in  
13 making this evaluation -- picking out the person I'd  
14 like to go to the prom with; is that it?

15 MR. REED: I think you're picking out the  
16 person amongst the group who will most adequately  
17 represent the interests of the company.

18 THE COURT: Right. And what is the real basis  
19 for doing that, looking around and saying, "well,  
20 they've done these cases, that case." Is that what I'm  
21 doing? What do I do? Did Judge Van Gestel consolidate?

22 MR. HALSTON: They were stipulated to, to be  
23 consolidated. They were heard on a consolidated basis.

24 THE COURT: Did he have lead counsel  
25 appointed?

1 MR. HALSTON: I don't know that he has entered  
2 an order for lead counsel. No.

3 MR. RUDMAN: [Shaking head from side to side].

4 MR. REED: If you choose not to appoint lead  
5 counsel in the derivative, we will work as a committee  
6 of the whole -- there's no question of that. I don't  
7 think there's so many of us that it's impractical. The  
8 question is: What makes the most sense for the Court?

9 MR. FEDERMAN: Your Honor, if I might, just  
10 briefly, Bill Federman again. I guess there are  
11 fundamental differences in the approach taken by counsel  
12 here. I have not worked very closely with Mr. Reed.  
13 I'm co-counsel with the Wolf, Hagenstein firm, probably  
14 a half dozen cases currently now. The Williams case was  
15 filed first, a derivative action. There's one other  
16 criteria. It's not the sole criteria. Unfortunately,  
17 the courts have not had the ability similar to the PSLRA  
18 in having a guideline to appoint lead counsel.  
19 Structurally, we don't think this case can really afford  
20 -- it's not a big enough case to have committees of  
21 counsel appointed. Mr. Kovacs, my local counsel, and I  
22 have worked together closely in other derivative  
23 actions. We're lead against Wave Systems in  
24 Massachusetts as well as IBIX which is pending in  
25 this court. We did not name all the defendants that

1 other counsel named. We distinguish a difference  
2 between loss and damages. We don't think it's necessary  
3 at this point to sue each defendant simply because they  
4 sold stock where we have information to believe,  
5 particularly Edward Harris, Michael O'Hara and Paul  
6 Jones, all of whom are vice-presidents of this  
7 corporation, were not involved in the wrongful acts.  
8 And the wrongful acts are the revenue recognition  
9 problem that actually cost the company 46 percent of its  
10 market cap from the high to the low of when things fell  
11 apart. This is an accounting problem, Your Honor, and  
12 bullet shot will be much more effective than a shotgun.  
13 And to bring efficiency to that type of case -- the  
14 accounting case -- Your Honor, I think it would be more  
15 efficient if we had a lead point law firm rather than  
16 rule by committee.

17 THE COURT: Well, I guess I really don't know  
18 enough about this case to make that kind of discreet  
19 judgment. And I guess my inclination is simply to Stay  
20 it until I see what Judge Van Gestel does and then sort  
21 through it after that, including the question of whether  
22 or not to have lead counsel, whether it's appropriate to  
23 have lead counsel here. I just tried to sort through, in  
24 some meaningful way, distinctions. I'm not intimately  
25 familiar with any of the counsel who are seeking to be

1       lead counsel in the derivative case, so I can't make a  
2       personal judgment in that way and I think it's going to  
3       have to be kind of shaken out a bit before I have some  
4       meaningful basis for making the kind of judgment that's  
5       necessary. Now, what problem does that pose?

6               MR. FEDERMAN: Well, Your Honor, I guess that  
7       we could work -- and so far, it hasn't been difficult to  
8       work with other securities counsel and defense counsel.  
9       There is obviously -- there is no automatic stay with  
10      derivative counsel the way there is in a securities  
11      case.

12             THE COURT: Right.

13             MR. FEDERMAN: So we would need to work out  
14      some order for preservation of all documents, including  
15      personal E-mails, hard drives of laptops. We want to  
16      encrypt or protect the hard drives on these people's  
17      laptops and preserve all E-mails. If we're talking  
18      about two to three months, honestly, Your Honor, it  
19      would probably not be terribly detrimental. If we're  
20      talking about five, six, seven, or eight months, it  
21      becomes a bigger problem although many of these people  
22      have been with the company for years. There's a  
23      possibility of them leaving, moving with -- I don't know  
24      if all these persons are even U.S. citizens. I know  
25      several are foreign-born. It's possible they could

1 leave, get beyond the subpoena power of the court.

2 THE COURT: What's the status of the  
3 provisional orders like that in the state court? Is  
4 there anything in the state court?

5 MR. HALSTON: I don't believe there are any.

6 THE COURT: Judge Van Gestel simply stayed the  
7 case and took the motion to dismiss under advisement; is  
8 that it?

9 MR. HALSTON: Correct.

10 MR. REED: At a minimum, it would seem  
11 efficient to consolidate the derivative cases for  
12 pretrial purposes here. So, assuming Judge Van Gestel  
13 is either going to dismiss the case or not, at that  
14 point, you would want an efficient way to address the  
15 litigation here even if you have stayed the case for  
16 temporary purposes.

17 THE COURT: That's for sure. The question is  
18 having a meaningful basis to make some judgment about  
19 how counsel is, apart from saying it sounds like an  
20 interesting resume'.

21 MR. REED: Well, it's entirely possible that  
22 if you were to consolidate the cases and direct us to go  
23 forth and confer, we could reach some agreement.

24 THE COURT: I think that's what I'm going to  
25 do. That is, I'm consolidating the cases.

1 I'm not yet appointing lead counsel. I'm  
2 telling you that I don't have a basis, I think, or  
3 structure to make an evaluation. And we'll set it down  
4 for further conference, say, six weeks from now,  
5 something like that.

6 MR. REED: That's fine. Would Your Honor be  
7 willing to entertain a co-lead structure or are you  
8 looking for a single firm to step forward as the --

9 THE COURT: No no. I'm told that there is not  
10 enough money in it for three counsel. So, is there  
11 enough for two?

12 MR. REED: Well, reasonable attorneys can  
13 differ.

14 THE COURT: Right, no doubt they can. I'm in  
15 favor of whatever is most efficient, the most efficient  
16 in the largest possible sense which is causing the least  
17 drain on all of the parties, not merely the plaintiffs,  
18 but also the defendants, having in mind that this is a  
19 derivative case.

20 So, the short of it is I'm willing to permit  
21 you to come up with something reasonable on this, but  
22 we'll consolidate the three derivative cases. I still  
23 am interested in assuring that there not be a conflict  
24 between the state court case and this case.

25 MR. REED: Now, are you staying them until



1       there is some ruling?

2               THE COURT: Yes. I'm going to stay for now  
3       pending the ruling, but actually have you come back  
4       here. I'm open to the idea of provisional remedies  
5       to preserve evidence and that sort of thing.

6               MR. REED: And then the appropriate thing to  
7       do would be to make a motion to lift the stay at such  
8       time.

9               THE COURT: Yes. And if Judge Van Gestel  
10       takes too long, you think, then I'll be open to it. But  
11       it seems to me having a reasonable amount of time to  
12       have at least one cut at this issue before we start to  
13       frame the issues for this case is a good --

14              MR. REED: Do you view six weeks as a  
15       reasonable time frame to set a date to come back?

16              THE COURT: Yes. I was going to ask Ms.  
17       Greenberg to do that.

18                               OFF THE RECORD

19              THE COURT: August 10. Other people take  
20       vacations, but --

21              MR. REED: That would work for my firm, Your  
22       Honor.

23              THE COURT: All right. So we'll say August  
24       10th. And what I would like is by August 5th some sort  
25       of status report --

1 MR. REED: Thank you.

2 THE COURT: -- with respect to both the  
3 question of the development of a lead counsel  
4 arrangement if you still think it's necessary, and the  
5 status of the state court, and suggestions about ways to  
6 coordinate with the state court. I just don't want the  
7 cases stumbling over each other.

8 MR. REED: Thank you.

9 THE COURT: All right.

10 MR. FEDERMAN: Will it be at the same time on  
11 August 10?

12 THE COURT: Yes, 2:30 on August 10th.

13 MR. FEDERMAN: Your Honor, if I cannot work it  
14 out or if we can't, I guess, all agree to a structure, I  
15 guess we could report. And would you want us to provide  
16 you with alternate ideas that other courts have --

17 THE COURT: Yes. At some point, I'm going to  
18 have to make a determination, I think.

19 MR. FEDERMAN: Right.

20 THE COURT: But I would prefer not to make a  
21 determination when I find the standards to be ones in  
22 which I would be potentially guessing about who it  
23 should be. It's as simple as that.

24 MR. REED: Thank you, Your Honor.

25 THE COURT: That means we're consolidating --

1 let me make sure that I have it right -- as a group  
2 No. 04-10359, No. 04-10384, and No. 04-10576. Is that  
3 right? Those are the derivative cases. And just so  
4 that it's clear, you'll be filing under 04-10359.  
5 Everything is going to be done electronically in terms  
6 of filing. So, I guess it's the Williams case that  
7 at least has the place for present purposes, but that  
8 doesn't necessarily mean that Williams counsel is  
9 lead counsel here.

10 MR. REED: It's the lead docket number?

11 THE COURT: Yes. All right. And you will  
12 work out with the defendants some provisional orders. I  
13 assume that the defendants are not opposed to some  
14 provisional order to preserve evidence here?

15 MR. FEDERMAN: Yes, Your Honor. Normally, we  
16 could do that by a letter agreement. With these law  
17 firms involved, I don't even think that would be an  
18 issue.

19 THE COURT: Okay. Good. All right.

20 So let's turn then to the question of the  
21 securities cases. And the question for me is after the  
22 submission of these materials from the underlying  
23 clients of BPI Global Asset Management, why shouldn't I  
24 appoint them?

25 MR. DOWNS: Your Honor, if I may, Travis

1 Downs of Lerach, Coughlin for the Global Undervalued  
2 Securities Fund. Bilateri (ph.) set up a structure  
3 encouraging institutional investors to set forth, take  
4 charge in private securities litigation. Comments --

5 THE COURT: It's a little different for Hedge  
6 funds, though, isn't it?

7 MR. DOWNS: Not exactly. Hedge funds do  
8 qualify as institutional investments.

9 THE COURT: They can. They can, but they have  
10 conflicting considerations, don't they?

11 MR. DOWNS: If they're engaging in short  
12 selling, day trading, abnormal atypical trading  
13 strategies, yes, they do have issues that may --

14 THE COURT: Do I know enough about your  
15 trading strategies to know how your client has been --

16 MR. DOWNS: Yes, you do. We've submitted in  
17 our declaration at Exhibit B in our moving papers and I  
18 believe it's F in our reply briefs, you will see our  
19 tradings and you will see our confirmations. Two things  
20 that take us out of the realm of the other cases and  
21 cite as qualifying Hedge funds are our clients bought  
22 their own account just like you or I would buy an  
23 account and not (inaudible) the clients. They not  
24 A-trade. They did not sell short. In fact, you've got  
25 a total of eight transactions, I believe.

1 THE COURT: So the question is then you're  
2 half the trading of BPI Global Asset, right?

3 MR. DOWNS: Well, back where I began, when  
4 Congress enacted the PSLRA, one, to the point of  
5 confusion. So, to do that, they focused on largest  
6 financial interest. But that's the first part of the  
7 test.

8 The second part of the test is you must  
9 satisfy Rule 23 absent typicality requirements. Here,  
10 various people have characterized the problem with BPI  
11 as an adequacy issue or largest financial interest  
12 issue. It really doesn't matter. The problem with BPI  
13 is that they don't have standing to sue. And they don't  
14 have standing to sue because they are not buying, suing  
15 on the purchase that they made for themselves.

16 THE COURT: Then I have to disregard  
17 Ezra Charitable Trust v. Rent-Way?

18 MR. DOWNS: I'm sorry?

19 THE COURT: I have to disregard Ezra  
20 Charitable Trust v. Rent-Way?

21 MR. DOWNS: Yes. I think those cases are  
22 distinguishable, particularly --

23 THE COURT: Distinguishable or I have to  
24 disregard them?

25 MR. DOWNS: No. I think they're just

1 distinguishable, different cases altogether. And the  
2 answer to Rent-Way -- and were an investment manager  
3 to sue, it has to have absolute authority and the  
4 authorization of his clients to bring the suit. in  
5 Rent-Way, you have the situation where it was a  
6 declaration of evidence. I guess it was the documents.

7 THE COURT: Well, what do I do with Mr. Cera's  
8 affidavit and Mr. Sweeney's affidavit?

9 MR. DOWNS: Well, I don't think that affidavit  
10 solved the problem, Your Honor. It does not -- one,  
11 it's not the actual document that sets up whether  
12 or not BPI, in fact, has actual authority as the  
13 attorney-of-fact who can sue. It doesn't determine --  
14 it talks about the funds, but there are several other  
15 applications. It's an open question as to whether or  
16 not those clients even know they're here. That has  
17 happened.

18 THE COURT: They don't know they're here?

19 MR. DOWNS: It's happened in other cases, Your  
20 Honor --

21 THE COURT: No doubt it has.

22 MR. DOWNS: -- where lead plaintiff --

23 THE COURT: But they don't know they're here?

24 MR. DOWNS: It's happened before. Lead  
25 plaintiff will go through a case. It's on appeal. They

1 find out they've been represented and they withdraw.

2 It was their duty. They had three opportunities -- in  
3 their opening papers, their opposition, their reply --  
4 to put forth evidence.

5 THE COURT: Even with just BPI Global Equity  
6 and BPI American Equity, they have the largest financial  
7 interest even if these other people don't know that  
8 they're involved.

9 MR. DOWNS: That creates another problem. If  
10 you are going to move the group, you need to be a  
11 cohesive group, show some ability to work together.  
12 Once you put that application in as a total, it is  
13 improper to start pulling out segments to reformulate a  
14 group that somehow allows you to capture relief.

15 THE COURT: They didn't pull out segments to  
16 capture relief. Those are the ones that together have  
17 losses of three million five hundred.

18 MR. DOWNS: I believe that's correct.

19 THE COURT: What do you have?

20 MR. DOWNS: Yet they did not --

21 THE COURT: What do you have?

22 MR. DOWNS: We have 900 thousand, 900,020.

23 However, you still have the issue with BPI, whether or  
24 not BPI sold those shares or purchased the shares, and  
25 whether or not BPI has authority to sue on behalf of its

1 clients. The position that we have taken and what other  
2 people argue, I think persuasively, looking at the  
3 Treadway case --

4 THE COURT: What would you have them do? How  
5 did they establish this? If you're not satisfied with  
6 the Cera and the Sweeney --

7 MR. DOWNS: It would have been completely --

8 THE COURT: Well, we're not talking "would  
9 have been." We're talking about what's going to happen  
10 here. Because I'm going to get it right.

11 MR. DOWNS: Well --

12 THE COURT: If there is a problem --

13 MR. DOWNS: Well --

14 THE COURT: No. Let me tell you: The  
15 gamesmanship is not something I'm very interested in.  
16 The nit-picking about certificates doesn't thrill me in  
17 the slightest. What I'm interested in is who it is that  
18 Congress really meant to do this. Who it is that  
19 Congress really meant to do it looks to me to be the  
20 investment advisor with the money, the largest amount of  
21 money who had the discretionary support and control over  
22 the sales. That's what it looks like to me. Now you  
23 say there's some problems here or they haven't done it  
24 right. What do you want them to do right so that I can  
25 make the determination and tell me, "you do that and



1       you've got it?"

2               MR. DOWNS: I want them to present evidence,  
3       the document that says we authorize BPI to act as  
4       attorney in fact for the movants that they have set  
5       forth and that they have also given the authority to  
6       sue on their behalf. As I say, they've had three  
7       chances to do that and they have not.

8               THE COURT: If that happens, that does it,  
9       doesn't it?

10              MR. DOWNS: If they were able to do that  
11       within the statutory period, that would solve their  
12       problem. However, as I say, they've had three  
13       opportunities and yet they have still not done it. If  
14       you go back to Rite-Way (sic), I think that's  
15       instructive.

16              THE COURT: Do you mean Rent-Way?

17              MR. DOWNS: Rent-Way. You have a lead  
18       plaintiff who saw the issue, presented in documentation  
19       that established that they were the attorney in fact,  
20       that they had the authorization and full, complete  
21       investment discretion over the investment, and had the  
22       authority to invest the money, bring a lawsuit if it was  
23       appropriate, and then also advise the client that they  
24       were in the case. You don't have those three indicias  
25       satisfied here. And in order to be the most adequate

1 plaintiff, you have to satisfy both requirements, the  
2 number of components, largest financial interests, and a  
3 Rule 23, just like the lead plaintiff who comes into  
4 court like in the Nace (ph.) case and says --

5 THE COURT: Right. I think I understand.  
6 Mr. Cera, why couldn't you do it right?

7 MR. CERA: Well, Your Honor, we think we did  
8 in the sense that we have submitted a declaration of the  
9 senior vice-president and general counsel, the ultimate  
10 controlling parent of these mutual funds. That is Mr.  
11 Galeen's letter in which he clearly and unequivocally  
12 states that --

13 THE COURT: It's in a letter?

14 MR. CERA: It's a letter attaching Exhibit 8  
15 to my declaration.

16 THE COURT: Where is his declaration?

17 MR. CERA: He hasn't submitted one, Your  
18 Honor, but we can submit one.

19 THE COURT: Why not?

20 MR. CERA: Well, we believe the letter would  
21 be sufficient, but we can submit one.

22 THE COURT: You submitted a letter under an  
23 affidavit from a lawyer. Why did you even submit an  
24 affidavit from a lawyer if you think letters are okay?

25 MR. CERA: Well, Your Honor --

1 THE COURT: And is that what I'm going to be  
2 facing from lead counsel in this case, that kind of  
3 sloppiness?

4 MR. CERA: No, Your Honor. We're going to do  
5 it right and I think we're going to do it right the way  
6 we did it in the case that you identified -- Rent-Way --  
7 in which I was the counsel.

8 THE COURT: I understand. And I wonder why it  
9 wasn't done here.

10 MR. CERA: Your Honor, I can't answer the  
11 question other than we felt that the submission of a  
12 letter from general counsel under his authorization  
13 under his signature attached to my declaration would be  
14 sufficient. But I can get and submit to the Court, if  
15 it deems it necessary, such declaration. I think the  
16 fundamental point, however, is that this record  
17 demonstrates very clearly that BPI Global had full  
18 investment discretion. And that is what the court in  
19 Rent-Way ultimately found the most compelling fact,  
20 the determinative fact. It didn't have anything to do  
21 with the attorney in fact or authority to sue issue  
22 which I think was made clear in the Rent-Way class  
23 certification decision which is reported at 218 F.R.D.[sic]  
24 So we went through every step in Rent-Way. We went  
25 through the lead plaintiff battle where similar

1 arguments were raised by other contenders and the court  
2 addressed that. And then we proceeded to litigate the  
3 case. And we got to the class certification stage and  
4 the accounting defendant resurrected these issues again.  
5 And we got into this issue very deeply with Judge  
6 McLaughlin and he did a very thorough analysis of all  
7 the facts. And he concluded and made very clear that  
8 the fundamental issue as to purchaser status is the  
9 level of discretion. Here, we had full and complete  
10 discretion, Your Honor, and there should be no issue  
11 about the purchaser status.

12 THE COURT: Let me hear from the defendants.  
13 Is there going to be an issue about this?

14 MR. RUDMAN: I don't believe we're permitted,  
15 under Greeble to put in our two cents at the time of  
16 selection of lead counsel.

17 THE COURT: You mean I can't hear you on this?

18 MR. RUDMAN: I don't think we're allowed.  
19 According to Greeble, I believe we are precluded  
20 from participating in this process.

21 THE COURT: Even if the Judge asks you?

22 MR. RUDMAN: Well, I don't know the answer to  
23 that, Your Honor, and I don't know enough about the  
24 underlying facts and circumstance as to who traded when  
25 and who has what damages in what quarter to give you an

1 answer now. It could very much be an issue on class  
2 certification.

3 THE COURT: All right. Now, with the  
4 exception of that question of them submitting an adequate  
5 affidavit that supports the position that they say they  
6 have, is there anything else that would disqualify them?  
7 They can bring -- I'm told, anyway -- a Section 11  
8 claim that other counsel cannot.

9 MR. DOWNS: And I understood what the Court  
10 said about the certification requirement. It is a  
11 technical requirement, yet an important one.

12 THE COURT: I agree. It's very important and  
13 it's quite disturbing that it wasn't done in an orderly  
14 fashion. That having been said, there's such a  
15 disparity in the financial interest in this case, that  
16 it makes no sense not to permit them at least the  
17 opportunity to meet the challenge that you've directed  
18 them to.

19 MR. DOWNS: Your Honor, I guess I have two  
20 observations, two comments. One, I heard a lot about  
21 counsel's involvement in the Rent-Way case; the  
22 other, BP Turkcell, and the experience. And the  
23 Court asked Mr. Cera, "why did you do it here?"  
24 Everyone knows that you have 60 days after the notice to  
25 make the motion. It's not like you're walking through

1 virgin snow here. There were footprints that followed.  
2 The fact that they did not comply, I'm not sure is  
3 entirely fair to the rest of the class members who  
4 complied with the statute fully for the Court to give  
5 them additional time. If the Court is inclined to allow  
6 them to put in a declaration to satisfy the requirement  
7 certification that the attorney in fact had complete  
8 control, I guess I would not object to that. But I  
9 think it does prejudice the class.

10 The lead plaintiff analysis is equally  
11 weighted, numbers, adequacy, under typicality under Rule  
12 23. I would ask the Court to take a look at the Rule 23  
13 issue because it's very dangerous to the rest of us in  
14 the class.

15 THE COURT: Why is it? I mean, apart from  
16 just, as I said, this kind of sloppiness that somebody  
17 would get straightened away after a while, why is that  
18 so prejudicial --

19 MR. DOWNS: It's very prejudicial.

20 THE COURT: -- that you got all cranked up  
21 for this case and then to find out that the Judge thinks  
22 that the premises are adequate, that they going to  
23 appoint someone else?

24 MR. DOWNS: The prejudice to the class is that  
25 defendants don't have an opportunity at this juncture to

1 really participate. However, if you appoint someone  
2 who is inadequate, we get down the road to class  
3 certification, they make all of their arguments as to  
4 adequacy and typicality. And let's say they have to  
5 make the argument that BPI has no standing and they can  
6 demonstrate that. Has it been done in the cases that  
7 have been cited in the briefs, including Turkcell?  
8 That exposes the rest of the class to potentially being  
9 tossed out. That's why I think Congress put Rule 23 up  
10 front.

11 THE COURT: All right. So now I'm presented  
12 with what I think I should be presented. But let's go  
13 back to this question of certification. Does  
14 certification have to be done by affidavit?

15 MR. DOWNS: Well, the certification --

16 THE COURT: Does certification of their  
17 qualifications have to be done by affidavit?

18 MR. DOWNS: I think absolutely. Well, most  
19 certainly the certification disclosing the prior  
20 litigation has to be done under penalty of perjury.

21 THE COURT: Right. But as to the --

22 MR. DOWNS: You put that in an affidavit.

23 THE COURT: -- as to these questions of  
24 standing?

25 MR. DOWNS: As to the other, the proper way to

1 do it, the way it's been done --

2 THE COURT: No. Does it have to be done that  
3 way?

4 MR. DOWNS: Yes. I would submit that it needs  
5 to be done as the --

6 THE COURT: Under the statute?

7 MR. DOWNS: Competent evidence that they have  
8 complied. And insofar as they've submitted it under --  
9 by letter, it doesn't satisfy competent evidence. They  
10 have not complied within the statutory period. Lead  
11 plaintiff has a big responsibility to the class and  
12 cannot be sloppy and to discharge all of their  
13 obligations timely and effectively and efficiently is a  
14 fact that really goes to the adequacy. Here, I do think  
15 a major problem is that you have the risk that you are  
16 going to install as a lead plaintiff a client or a  
17 plaintiff who does not have standing. And that puts --  
18 AMGEN says that the class must have adequate  
19 representation at all times.

20 THE COURT: If they're able to submit an  
21 affidavit that supports the letter of submission, they  
22 will have it, won't they, under the Rent-way  
23 certification decision?

24 MR. DOWNS: No. I don't believe that this  
25 letter satisfies the requirements. I think if they



1       haven't, if he had the documents, your client came in,  
2       I'm sure they signed an agreement that gave BPI complete  
3       and absolute discretion to make the investment decisions  
4       to give BPI the complete and absolute authority to take  
5       action to sue if required, and that they informed BPI or  
6       the fund that BPI would be seeking lead plaintiff, if  
7       all that existed, I think we have seen it. Now, if they  
8       want to try to generate that after the fact and the  
9       Court wants to allow them to do that, then I guess we do  
10      that. But I think it's untimely. The fact that they've  
11      had three chances to do it and they haven't done it, I  
12      think, should raise the concern that they don't have it.  
13      This letter -- and they haven't done it the right way in  
14      Rent-Way. And then coming back with this letter, I  
15      mean, that raises concerns whether or not the clients  
16      are actually authorizing that they're representing.  
17      That letter doesn't get it done in affidavit form.

18               THE COURT: Do you have authorization --  
19      separate authorization?

20               MR. DOWNS: No, Your Honor. We have  
21      authorization, not separate authorizations. We have  
22      authorization from BPI Global Asset Management and its  
23      controlling entity which controls the individual mutual  
24      funds.

25               THE COURT: What's the form of the

1 authorization?

2 MR. DOWNS: The form of the authorization,  
3 Your Honor, is the affidavit of Mr. -- the declaration  
4 rather of Mr. Sweeney, verbal communications between  
5 myself and my clients, and the letter submission of  
6 Mr. Galeen as well as the fact that the underlying  
7 documents authorize them to do so. And, Your Honor,  
8 this is not really materially different, why we have  
9 presented from what was presented in Rent-Way.  
10 Because in Rent-Way, we had a declaration initially  
11 from Mr. Maroney, I believe his name was, which is  
12 analogous to the Sweeney declaration. So, we really  
13 followed, I think, the program that led the Rentway  
14 court to conclude that the client there was a proper  
15 lead plaintiff. Let me just refer back to the statute  
16 that we're dealing with here, Your Honor. Because once  
17 the numbers work in a particular lead plaintiff's favor,  
18 there's a rebuttable presumption.

19 Now the way that this should proceed is not  
20 for counsel to stand up and make arguments. The  
21 statute requires them to rebut the presumption upon  
22 proof that we will be an inadequate representative of  
23 the class.

24 THE COURT: Do you want discovery then?

25 MR. DOWNS: Well, Your Honor, in certain

1 circumstances, discovery is permitted.

2 THE COURT: Is that what you're saying?

3 MR. DeVALERIO: No. I'm saying -- no, Your  
4 Honor. I'm saying what we've submitted should be  
5 enough. And if the Court feels that there is any hole,  
6 if you will, in what we submitted, we can undoubtedly  
7 correct it and do so promptly. But on these numbers --

8 THE COURT: What does promptly mean?

9 MR. DeVALERIO: One week.

10 THE COURT: All right.

11 MR. DOWNS: Perhaps we should do the  
12 discovery. We can meet at their offices, ask these  
13 questions, get it under oath, and we can find out  
14 whether or not --

15 THE COURT: No. What's going to happen is  
16 they will file what they consider to be -- or what I've  
17 indicated is necessary, which is affidavits from the  
18 people who make the decisions on all of the issues that  
19 have been raised here and in the papers with respect to  
20 your standing. You can respond to that if you want.

21 MR. DOWNS: Yes, we would like to.

22 THE COURT: And I'll let you have a week to  
23 respond --

24 MR. DOWNS: Thank you.

25 THE COURT: -- to that. But I have to tell

1       you, just so you're not spinning wheels, if they do it,  
2       I'm likely to make them the lead counsel. And I will  
3       make them now provisionally lead counsel in the case.

4               MR. DOWNS: That is fine. Had they could  
5       have done it before, they would have done it by now.  
6       They haven't. So we'll look forward to seeing their  
7       submission.

8               Just for the record so that we're clear, we  
9       are not arguing that they are entitled to presumption  
10      based on the numbers. Our position is that they got a  
11      big zero because they don't have standing. So it's not  
12      our job --

13              THE COURT: Well, but that's certainly not the  
14      Rent-Way, is it?

15              MR. DOWNS: Well, the Rent-Way resolution  
16      says that the investment advisor has standing to sue,  
17      hence can claim all of the damages. In this case, I  
18      think it is so open to find out whether or not they have  
19      any standing. If their clients don't have the  
20      authority, they don't have the authority to sue on  
21      behalf of the clients --

22              THE COURT: But what if they do? If they have  
23      the authority to do the trading, Rent-Way has made  
24      clear that they're the purchaser.

25              MR. DOWNS: Well, this looks a lot like

1     Turkcell where a court concluded that they did not  
2     have authority to sue.

3             THE COURT:   Yes, a court did.

4             MR. DOWNS:   On similar evidence.   And it looks  
5     like Smith v. --

6             THE COURT:   Not quite the same evidence.

7             MR. DOWNS:   We'd be happy to take the  
8     opportunity to respond to whatever they care to respond  
9     to.

10            THE COURT:   All right.   Well, the short of it  
11     is I will permit you to file a set of competent evidence  
12     -- that is, along the lines of a Rule 56 affidavit, that  
13     presumably a person with authority is indicated through  
14     affidavit as having the authority and addresses of these  
15     issues with a short response -- a short narrative  
16     submission.   That will be done July 2nd.   I'm sorry.  
17     We're talking a week from now.   I guess it would be the  
18     6th.

19            MR. DeVALERIO:   Very well, Your Honor.

20            MR. DOWNS:   Your Honor, just a question.   Are  
21     they required also to submit the underlying documents  
22     that reflect the authorization?

23            THE COURT:   Yes.

24            MR. DeVALERIO:   Your Honor, can I comment?

25            THE COURT:   Sure.

1 MR. DeVALERIO: Your Honor, I represent Mr.  
2 Brower who is obviously substantially smaller in terms  
3 of losses. My question to the Court is: We had  
4 comments with regard to the BPI application -- excuse me  
5 -- to the Global application as well.

6 THE COURT: Right.

7 MR. DeVALERIO: And I wanted to find out what  
8 Your Honor's plans were if you were to deny BPI.

9 THE COURT: Then we're back to square one.

10 MR. DeVALERIO: And we would then discuss the  
11 next in line?

12 THE COURT: Yes. I mean, it seems to me I do  
13 it by --

14 MR. DeVALERIO: Seriatim?

15 THE COURT: Yes, to determine if --

16 MR. DeVALERIO: That's fine.

17 THE COURT: -- they can make it.

18 MR. DeVALERIO: The only additional comment  
19 that I would make -- and I don't want to take up too  
20 much additional time -- is that I think that while  
21 Rent-Way suggests one result, not only does  
22 Turkcell suggest another result, but I think also  
23 the question is under the PSLRA. They have never  
24 responded to why they didn't disclose Turkcell.  
25 The application requires under the PSLRA to list all

1 the cases.

2 THE COURT: Right. No, they responded. They  
3 said "whoops." But the --

4 MR. DeVALERIO: Whoops?

5 THE COURT: Yes. You know, it's not -- I  
6 can't say that I'm impressed by the response, but they  
7 responded. And it's not disqualifying in any way that  
8 this disclosure of one occasion on which they had sought  
9 had not been successful.

10 MR. DeVALERIO: Well, the best we could figure  
11 out, it applied twice, once in Rent-Way, once in  
12 Turkcell, granted once, denied once, told the Court  
13 about the one they were granted, never told the Court  
14 about the one they were denied. If the statute has to  
15 have any meaning in terms of the disclosure obligations  
16 -- and all of us in this room on the plaintiff's side  
17 are expert to the nth degree and every jot and tittle of  
18 the PSLRA, we know it inside out and backwards.  
19 These clients know it and their counsel know it to a  
20 fare-thee-well. They know how to ask the questions.  
21 They know how to do the research to find out everything  
22 about their client. To stand up in front of the Court  
23 and say "we forgot," to inform the Court about one of  
24 the two applications we made and to say that is not  
25 disqualifying under the PSLRA, I think, turns the PSLRA

1 on its head.

2 THE COURT: Well, would it --

3 MR. DeVALERIO: I think that given the --

4 THE COURT: If they disclosed it, would it  
5 have made any difference on this issue?

6 MR. DeVALERIO: Yes. It's candor. It's  
7 coming from forward and telling the truth to the Court.

8 THE COURT: Would it have made any difference  
9 in this case?

10 MR. DeVALERIO: Well, it could have if no one  
11 else had discovered it. Obviously, there were  
12 competing --

13 THE COURT: Did someone discover it or did it  
14 appear in the context of opposition? Who was the first  
15 person who notified me that they made a mistake in the  
16 certification?

17 MR. DeVALERIO: I think we all probably found  
18 out.

19 MR. DOWNS: I think it's fair to say in their  
20 opposition papers, we all --

21 THE COURT: Mr. Cera?

22 MR. CERA: It was myself, Your Honor, in our  
23 submission. We identified the fact that we had  
24 inadvertently omitted Turkcell in the certificate.  
25 And I'm glad Mr. DeValerio feels so confident that he



1 can stand up here and claim that he's never made an  
2 error of that sort in his entire career. Obviously, it  
3 was an error.

4 THE COURT: I didn't hear that, but perhaps --

5 MR. CERA: But he did make an error, Your  
6 Honor, in telling the Court about BPI was the movant  
7 in Rent-Way. They were not. He has misspoken on  
8 that issue. The movant was Kramer --

9 THE COURT: Well, I think I've had enough of  
10 that. The short of it is that kind of thing is not going  
11 to disqualify here.

12 MR. CHECK: Your Honor, will all parties with  
13 any motions be allowed to respond to the submission?

14 THE COURT: Yes, you will. But I'm telling  
15 you. Maybe you want to. Maybe you have things -- you  
16 know, July is slow. But I have to tell you the way in  
17 which this is likely to play out is if they submit  
18 competent evidence with respect to this issue and square  
19 their corners, they are likely to be the lead counsel in  
20 this case. All right.

21 Now, is there something else that we need to  
22 do? We're going to consolidate all of these cases in  
23 one case, in any event.

24 I've said provisionally that lead counsel --  
25 that's without portfolio because I don't think there's

1 anything that needs to be done at this stage yet, except  
2 to ensure consolidation. Is there anything that needs  
3 to be done in these cases in the next month or so? Can  
4 anybody think of anything?

5 MR. DOWNS: Your Honor, the joint stipulation  
6 contemplates that the lead plaintiff would prepare a  
7 consolidated complaint. Defendants would have a period  
8 of time to respond if it raises a motion to dismiss.

9 THE COURT: Sure.

10 MR. DOWNS: In light of supplemental  
11 submissions, perhaps that schedule should be deferred  
12 until the Court issues a final order on the appointment  
13 of lead plaintiff.

14 THE COURT: Right. My only question is  
15 whether or not that poses problems for the parties here.

16 MR. DOWNS: None that I can see.

17 THE COURT: Okay. Is there anything else?

18 (No response from counsel)

19 THE COURT: Okay. Thank you very much.

20 RECESSED AT 3:15 P.M.

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C E R T I F I C A T E

I, PAMELA R. OWENS, Official Court Reporter,  
U. S. District Court, do hereby certify that the  
foregoing is a true and correct transcription of the  
proceedings taken down by me in machine shorthand and  
transcribed by same.

Pamela R Owens 6/28/04